FUNDAMENTAL RIGHTS AND THE APPLICATION OF THE TOPICAL-HERMENEUTIC METHOD IN THE THEORY OF CRIME

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Abstract:
This article investigates the applicability of the topical-hermeneutic method within Brazilian criminal law, particularly in cases in which the criminal liability is excluded, despite the absence of express statutory provision. The central hypothesis of the research is that this method of interpreting criminal law — which seeks to balance the systematic application of legal norms (syllogistic) with the analysis of the concrete case (topical) — does not violate the principle of legality, but rather concretizes it, by allowing decisions which preserve human dignity. It is argued that the topical-hermeneutic method understands the law as a negative limit, one which prevents arbitrary punishment, and the concrete case as a positive limit, which may legitimize the judicial exclusion of criminal liability, even if there is no express statutory provision.

Keywords:
Criminal Dogmatics. Topical-Hermeneutic Method. Principle of Legality. Insignificance Principle. Supralegal Grounds for Excluding the Elements of Crime.

Summary

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1. INTRODUCTION

The aim of this article is to investigate cases in which the criminal liability of the agent has been excluded by Brazilian courts, without there being express statutory justification or excuse within the framework of the theory of crime.

The research problem rests upon the following question: is a judge, by removing the criminal liability of the subject outside the hypotheses provided for by the legislator, violating the principle of criminal legality?

As a provisional answer, this research understands that the topical-hermeneutic[3] method[4] enables the judge to recognize the circumstances of the concrete case in order to exclude criminal liability of the subject, even if such decision lacks express statutory

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[3] BRANDÃO 2008, 17-18. This seems to be also the understanding of Hernán Hormazábal Malarée, when assessing the unenforceability of different conduct, excluding supralegal culpability: 'Furthermore, there is no legal impediment to admitting, within the theory of the responsible subject, supralegal grounds for exemption from criminal liability that constitute instances of non-exigibility. While it is true that Article 4(3) of the Penal Code refers to a 'rigorous application of the provisions of the Law,' this does not imply a distorted extension of the principle of legality to the grounds for excluding liability. In our view, 'rigorous application' does not signify a restrictive interpretation of the text, but rather an interpretation consistent with the Constitution and the fundamental principles of a Social and Democratic State of Law.' (HORMOZABAL MALAREE 2005. Certainly, '[...] dignity is the key to reading a model of constitutional engineering that encompasses the diversity of multiple cultures, experiences and worldviews imaginable or present in the Brazilian reality' (Fonseca 2019, 84).

[4] The method is associated with 'how to know?'; it is precisely the set of principles for the investigation of the object (Ferraz Junior 1980, 11).

provision. This is because democratic criminal dogmatics — constructed through argumentation regarding criminal law itself and its constitutive elements — must always seek the protection of human dignity.

The topical-hermeneutic method seeks a balance between the syllogistic[5] and topical[6] interpretations. It combines them by making use of law[7] as a guarantee that no one shall be punished without

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[5] For João Maurício Adeodato, 'The law of some more complex societies, which can be said to be dogmatic, is characterized, as initial postulates, by only considering arguments allegedly based on a text of a pre-existing norm in the state system. The interpretation and application of this right are presented as syllogistic: the alleged state norm, generally expressed by law or jurisprudence, represents the major premise; the concrete case, by a process of subsumption, constitutes the minor premise; and the individual norm applied to the specific case corresponds to the conclusion. This dogmatic way of organizing state law is also supported by three other basic postulates, among several, which are the obligation to decide or prohibition of *non liquet*; the obligation to interpret, providing concrete scope and meaning to general norms; and the need for reasoning or legitimation.' (ADEODATO 2002, 276).

[6] According to Celso Bastos 'It should be made clear that the starting point of the topic is not the study of the legal norm, as occurs with other interpretation techniques, but the study of the problem. We start from this to the norm. The topic exhaustively analyzes the problem, as well as the various alternatives and different responses that it entails, which means that it is necessary for the interpreter to make a decision regarding the adoption of one or the other solution.' (BASTOS 2014, 185).

[7] The principle of legality is provided for in the Brazilian criminal legal system in article 5, XXXIX, of the Federal Constitution, and in article 1 of the Penal Code. According to Ana Elisa Bechara, '[...] In addition to the formal requirement of normative predetermination of the sphere of the punishable, the content of the principle of legality also includes a function of guaranteeing the freedom of citizens,

express statutory provision, while regarding the specific case as a positive limit, in which a decision may expand an individual's sphere of liberty. This reveals the character of a criminal law system, as *ultima ratio*, adequate to the Democratic Rule of Law[8].

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by exhaustively conditioning the catalog of crimes and penalties to the decision of the Legislative Power, a democratically constituted instance of representation of the general will that must act as a brake against possible abuses of the other Powers'. (BECHARA 2018, 130).

[8] According to Cláudio Brandão, [...] post-positivist philosophy seeks a balance between the syllogism and the topical, recognizing that Law admits a superposition between two spheres: the sphere of understanding the norm, on the one hand, and the sphere of understanding the fact, on the other, carried out by the historically present being, by the argumentative procedure. This method is called topical-hermeneutic. Therefore, in the criminal method, the law and the understanding of the case are used. The law is the negative limit, that is, the incrimination of what is outside it is not admitted, since it has the function of guaranteeing man in the face of the power to punish, as it has been proclaimed since the Enlightenment. The negative limit of the criminal method harmonizes it with the constitutional principle of legality. The case gives the positive limit, and can be used as a means to justify a decision that increases the scope of freedom, that is *pro-libertatis*. As the purpose of legality was to guarantee man's freedom in the face of the power to punish, as discussed above, the topic is teleologically in accordance with legality, and there is no incompatibility between them. In fact, decisions not based on the syllogism are possible, because of the importance that must be given to man. This, in fact, represents the fulfillment of the Constitutional Principle of the Dignity of the Human Person, because the man is only valued from the understanding of the case, which translates his real history, which is unique and unrepeatable. (BRANDÃO 2008, 17-18).

The proposal of the topical-hermeneutic method aims to methodologically reconcile problem-based thinking (topical), along with deductive-systematic reasoning.

For Theodor Viehweg, 'Topical thinking is a technique of thinking through problems developed from rhetoric. It presents a spiritual structure that, even in its particularities, is clearly distinguished from a deductive-systematic structure.'[9]

The problem cases – which infer the application of the topical-hermeneutic method by Brazilian Courts, although it is true that the Courts do not expressly refer to it in their sentences – were the supralegal exclusions of typicity (principle of insignificance, or *de minimis*), anti-juridicity (consent of the offended party) and culpability (non-exigibility of alternative conduct).

The proposed method does not seek to supplant, as aforementioned, the 'system-thinking', typical of positive law, by the 'problem-thinking', characteristic of topical thinking. Rather, this research aims to reconcile both. In this sense, it is conceived the system-problematic method, or topical-hermeneutic method, as we prefer to define it. [10]

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[9] Viehweg 2008, 16. Further on, Viehweg states: 'The most important aspect in the analysis of the topic is the realization that it is a technique of thought that is oriented to the *problem*.' (Viehweg 2008, 33).

[10] Sainz Cantero points out that: 'More recently it is, however, the characteristic trait of the actuality of the Science of Criminal Law: The desire of approximation to reality, which is to be appreciated in all sectors of the doctrine. Manifestations of this tendency are, among others, the preference for the concrete problem, with the consequent lack of concern for the system, which is equivalent in the methodological way to opting for the thought-problem with abandonment of the thought-system and the inclination to the meta-legal reality that is externalized by

2. TOPIC, RHETORIC AND JURISPRUDENCE

First, we must understand the concept of *topics*, which, although not widely recognized as such, appears in contemporary usages such as "topography," "topical use," "utopia," and "dystopia." To do so, we follow a tradition that connects Aristotle, Giambattista Vico, and Theodor Viehweg. Drawing on Aristotle's *Topics*, these authors argue that legal dogmatics should not oppose the characteristic structure of legal argumentation – the topical – but rather incorporate it into its doctrine. Their starting point is the idea that law does not admit universally valid statements in general terms, since its original source lies in conflict – practical legal problems that are in constant transformation.

Traditional dogmatic thought, by contrast, begins from the notion of a priori systems which, taken as a whole, constitute the legal order and are intended to be sufficiently flexible to encompass all concrete cases. This, Viehweg argues, amounts to a "systematic prejudice."

Topics may be understood as the basis of argumentation aimed at solving problems through the problems themselves, relying on elements endowed with recognized persuasive force. The "catalogues of topoi," present in every culture, consist of sets of notions suited to generating consensus regarding the solution of a given problem – or, in the legal sphere, regarding the decision of a legally relevant conflict.

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an intense concern for Criminal Policy and by the attention that is given to the results of non-legal sciences such as Psychology, Sociology and Criminology.' (SAINZ CANTERO 1981, 157).

Such notions also appear in everyday life, without any scientific pretension. Law is one of those fields of knowledge in which one cannot proceed from universally valid premises, since the foundation of prudence – within which jurisprudence is situated – lies not in apodictic truths, but in argument and counterargument, in the problematic attitude (the *dissoi logoi* of sophistry) that topics make possible.

It should be noted that this is not a claim that the application of law *ought* to be based on catalogues of topoi, but rather that it *is*, in fact, grounded in them. Dogmatic thinking, however, tends to obscure the topoi of legal argumentation. The application of state law – dogmatic par excellence – often displays a tendency contrary to the more casuistic approach one would expect from a topical perspective. Jurisprudential summaries illustrate this tendency, especially when they claim generalized binding force, as does the tutelary orientation of labor law in the Brazilian context. Even within common law systems, one can observe a similar phenomenon.

There are, nevertheless, significant difficulties in reconciling the topical attitude with the dogmatic one, as well as with the scientific aspirations of jurisprudence. From an epistemological standpoint, particularly under Kantian assumptions, law cannot be understood solely through a repertoire of empirically verified knowledge (the topoi). For example, topical thinking does not easily accommodate the requirements of mandatory decidability and completeness in the legal system (the prohibition of *non liquet*): the assumption that every problem has a solution seems not fully compatible with taking the problem itself as the starting point.

The topical approach, however, can be integrated into dogmatics, provided that neither is treated as absolute. A degree of interpenetration may be desirable in legal practice, and the growing prominence of hermeneutics and the creative role of judges supports this view. Aristotle's own words may help dissolve the apparent antagonism between dogmatics and zetetics – or at least between dogmatics and topics:

"…Records of discussions should be formulated in universal terms, even when only a particular case has been debated, because this enables us to derive multiple rules from a single instance […] In reality, all particular arguments also reason universally; in other words, every particular demonstration contains a universal one, since it is impossible to reason at all without employing universals."[11]

The argumentative line of legal topics has also been criticized for its excessive "openness" toward the normative text, which it treats as merely one topos among others. By rejecting the primacy traditionally accorded to the connection with the text, this approach is said to render "problem-oriented reasoning" excessively free, failing to provide a sufficiently secure decision-making procedure – something considered indispensable in a democratic rule of law.

Nor does discourse theory and legal argumentation fully escape criticism. Although it rightly acknowledges that the jurist's work is not limited to applying codified rules but also involves producing them, it rests on two highly problematic assumptions. First, it

[11] ARISTOTLE 1990, 97.

presupposes an "anthropologically atavistic communicative competence," allegedly inherent in every human being – that is, a universal capacity for communication and learning. This assumption, besides expressing an optimistic view regarding the viability of criteria for justice and truth, continues to search for a rule-generating mechanism (such as rationality or solidarity) from which decisions would ultimately flow. Second, despite its intention to oppose normative positivism, discourse theory shares with it a tendency to subsumptively derive decisions from rules – an attitude that Friedrich Müller characterizes as "regulative Platonism."[12]

From this perspective, Viehweg's topical approach appears to lead to an excessive openness toward the normative text, treating it as only one topos among others. Critics argue that, by rejecting the dogmatic postulate of a necessary connection with the text – traditionally regarded as essential to the democratic rule of law – the topical approach transforms problem-oriented reasoning into an overly unconstrained method, thereby approaching decisionism.

At the same time, even critics of this type of argumentation theory who seek an "objective-rational foundation of law" concede – often with notable optimism – that a definitive decision, even when unanimous, is in many cases only one possibility among several. This plurality, however, is not attributed to mere voluntarism in choice, but rather to a careful and scrupulous weighing of reasons.[13]

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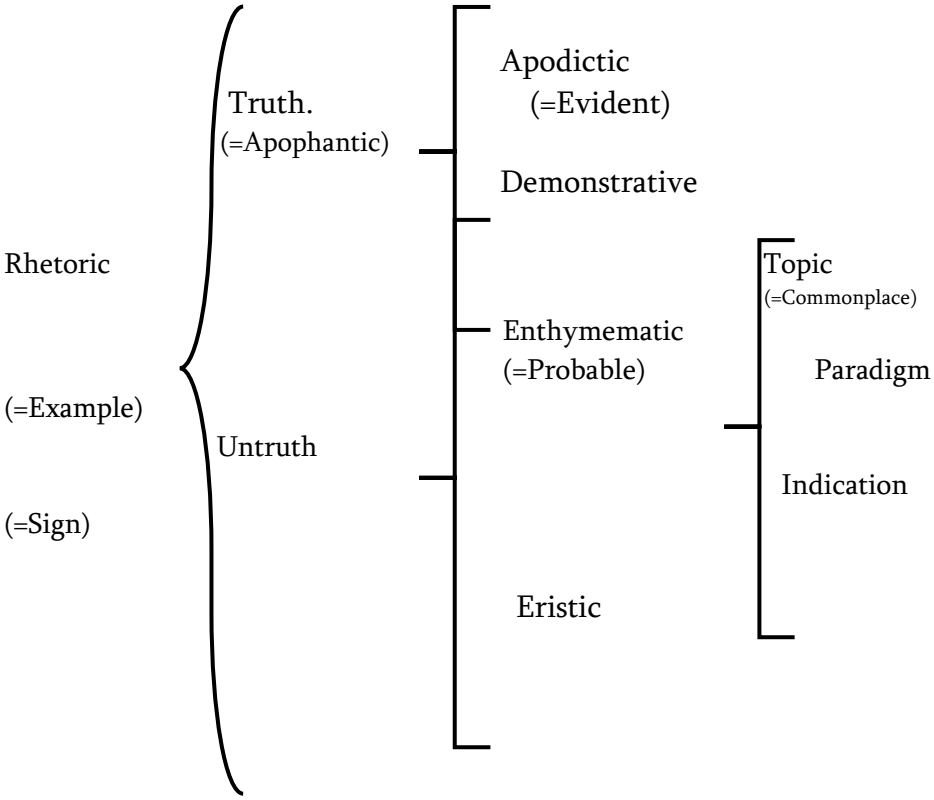
[12] MÜLLER CHRISTENSEN SOKOLOWSKI 1997, 109-110 and 122-123.
[13] FINNIS 2011.

Theodor Viehweg was the first to revive the rhetorical tradition in European legal doctrine after the Second World War with his book *Topics and Jurisprudence*, which could just as well have been titled *Rhetoric and Jurisprudence*. Although the work provoked considerable criticism, the term "topics," being less familiar, initially attracted less resistance.

To better understand where topics are situated within rhetoric, one may consider a classificatory scheme in which rhetorical and ontological categories intersect.



Rhetoric, in the broadest sense, encompasses knowledge of human language. Statements within language can then be classified according to whether they aim at truth. Those that do may be either self-evident (apophantic) or dependent on demonstration. By contrast, linguistic forms that do not admit truth as a criterion divide into enthymemes, grounded in probability, and eristic or sophistic arguments, which aim to prevail in discourse by any means. A more detailed treatment of this schema, along with specific references, can be found in literature. [14]

3. THE LEGAL-CRIMINAL CONSTRUCTION OF THE PRINCIPLE OF LEGALITY

The principle of legality is a watershed in criminal law[15]. This is because, before its political-legal structuring, criminal law was known for its arbitrariness. However, following the institution of the principle of legality, criminal law inaugurated, with the liberal period, a new phase, guided by the dignity of the human person.[16]

If, on the one hand, the principle of legality responded to the prevailing state power, that is, to the abuses of absolutism, on the other hand, it revealed the affirmation of a new order of guarantee of the individual against the state power[17].

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[14] ADEODATO 1999, 135 - 152. ADEODATO 2016, 1-18. ADEODATO 2026.

[15] BRANDÃO 2002, 11.

[16] COSTA 2008, 36.

[17] BATISTA 2001, 65. According to José Urquizo Olaechea, 'The penal law is presented as a creative instrument of freedom and has the principle of legality as a support of this function. The Western Criminal Law is not conceivable without the

The political significance and scope of the principle of legality go beyond the historical conditions which produced it; they remain the master key of any criminal system that intends to be rational and just. Politically conceived by Cesare Beccaria in 1764 in his work *On Crimes and Punishments*, the principle of legality plays an essential role in delimiting judicial actions and preventing arbitrary punishment, since '(...) the laws only can determine the punishment of crimes, and the authority of making penal laws can only reside with the legislator (...).'[18]

Beccaria sought to eliminate the arbitrariness of the time by stating that it was the exclusive province of the legislator to formulate laws and that penalties could not exceed the limits set by them. Thus, the principle of legality, besides ensuring citizens have prior knowledge of crimes and their respective penalties, protects the individual against state power, as they are no longer subjected to criminal coercion other than that established by criminal law.[19]

We emphasize, however, that the dogmatic formulation of the principle of legality belongs to Feuerbach, according to which 'every legal punishment in the state is the legal consequence of a statute that is based on the necessity of maintaining the rights of others and that threatens the violation of a right with a sensual evil.[20] From this assertion derive three principles that guide all penal dogmatics: *nulla*

principle of legality, so much so that it symbolizes the legal culture of the West and its mark of influence.' (URQUIZO OLAECHEA 2000, 61).

[18] BECCARIA 1999, 30.

[19] BATISTA 2001, 67.

[20] FEUERBACH 1989, 63.

poena sine lege (there is no punishment without law); *nulla poena sine crimen* (there is no penalty without a crime); and *nullum crimen sine poena legali* (there is no crime without a legally prescribed penalty).[21] These premises are internalized in the Brazilian legal system, under article 5, item XXXIX, of the Constitution of the Federative Republic of Brazil[22]; and under article 1 of the Brazilian Penal Code[23].

The principle of legality was, therefore, an indispensable condition for the emergence of criminal dogmatics. It is the fundamental substrate on which all criminal law is based, because without criminal law there can be no crime, nor its legal counterpart, the penalty.

In an attempt to rationalize the use of state violence, that is, to move away from barbarism and reaffirm civilization, the Germans developed in the nineteenth century the criminal dogmatics, currently understood as the argumentation derived from criminal law and its constitutive elements. In other words, criminal dogmatics is the method of criminal law[24], the theory that seeks to attribute scientific rigor to the study of criminal law and that is, in our view, established through topical-hermeneutic thinking.

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[21] FEUERBACH 1989, 63. 'Contrary to what is often disseminated, Feuerbach's works do not contain the broad formula *nullum crimen nulla poena sine lege; neas se encontra*, but an articulation of the formulas *nulla poena sine lege*, *nullum crimen sine poena legali* and *nulla poena (legalis) sine crimine*.' (BATISTA 2001, 66).

[22] 'Article 5 (...) XXXIX - there is no crime without a previous law that defines it, nor a penalty without prior legal sanction;'

[23] 'Article 1 - There is no crime without a previous law that defines it. There is no penalty without prior legal sanction.'

[24] BRANDÃO 2008, 06.

Criminal dogmatics attributes scientific rigor to criminal law by representing a form of thought that aims to constitute a conceptual framework for the action to become a crime,[25] - nowadays, understood as a typical, anti-legal and culpable conduct[26], - as well as structuring the reasoning that justifies the hypotheses of exclusion of the agent's criminal liability.

The unjust and the culpability are prior and independent conditions for the imposition of a penalty (the legal consequence of the crime).[27] While typicity[28] and anti-juridicity [29] constitute what is termed the 'criminal unjust', culpability is the prerequisite for the application of the penalty, functioning as the support and legitimation of the entire

[25] BRANDÃO 2012, 26.

[26] According to Juarez Cirino dos Santos, 'the tripartite system of punishable facts, still dominant in contemporary dogmatics, defines crime as a typical, anti-juridical and culpable action, a concept formed by a noun qualified by the attributes of adequacy to the legal model, contradiction to prohibitive and permissive precepts and reprobation of culpability' (SANTOS 2012, 76).

[27] Typicity is a judgment of the adequacy of the fact to the norm. Anti-juridicity, in turn, is a judgment of disvalue that qualifies the fact as contrary to the law. According to Welzel, anti-legality is a relationship between the action and the legal system that expresses the non-conformity of the former with the latter.

[28] Typicity is a judgment of adequacy of the fact to the criminal type.

[29] Anti-juridicity, in turn, is a judgment of disvalue that qualifies the fact as contrary to the law. According to Welzel, anti-juridicity is a relationship between the action and the legal system that expresses the non-conformity of the former with the latter (WELZEL 1997, 166).

criminal law system[30]. It is thus a dogmatic category, as it is found within the theory of crime[31].

The method of criminal law interpretation at the end of the 19th century and the first half of the 20th century was syllogistic, with a strong attachment to criminal legality in order to avoid the arbitrary punishments of the absolutist period. The political distortion of the principle of legality was precisely because this principle was not conceived to restrict individual liberty, but rather to provide predictability (certainty) to the possible of restriction of liberty, thereby eliminating arbitrary judicial punishment and conferring exclusively upon the legislator the power to prescribe punishment.

That is why Beccaria states that '(...) the laws only can determine the punishment of crimes, and the authority of making penal laws can only reside with the legislator (...).'[32] In addition, the premise *nulla poena sine lege* (there is no punishment without law), structured by Feuerbach, holds the importance of the principle of legality in refusing to admit the existence of crimes outside the hypotheses provided by law.

The adoption of supralegal grounds for excluding the elements of the analytical concept of crime by Brazilian jurisprudence—which justifies the courts' adoption of the topical-hermeneutic method—does not violate the principle of legality. On the contrary, it affirms it, since the principle was conceived to increase the individual's sphere

[30] FLORÊNCIO FILHO 2023.
[31] FERRÉ OLIVÉ 2017, 430.
[32] BECCARIA 1999, 30.

of liberty and avoid arbitrary punishment based on concrete cases without statutory basis; it does not prevent the judge from granting greater liberty based precisely on the specificities of the concrete case.

4. THE PRINCIPLE OF INSIGNIFICANCE AS A SUPRALEGAL CAUSE FOR EXCLUDING TYPICITY

The principle of insignificance has been widely discussed in the Brazilian criminal legal system, being recognized as a ground for excluding typicity[33].

[33] The origin of the principle of insignificance is usually attributed to Roman law, more precisely related to the brocardo *minima non curat Praetor*, as can be seen in Zaffaroni: 'The ancient maxim *de minimis non curat praetor* serves as the foundation for the modern formulation of the so-called principle of insignificance (or bagatelle principle). According to this doctrine, negligible infringements upon protected legal interests do not constitute a relevant injury for the purposes of objective typicity.' (ZAFFARONI, SLOKAR, ALAGIA 2006, 376). In the same sense: BITENCOURT 2018, 62; MARTINELLI, BEM 2021, 323. Interesting is the consideration about the origin of the institute elaborated by Juarez Tavares: 'The origin of the institute is usually attributed to Roman law, whose maxim *of minimis non curat praetor* would already constitute a limitation of the State's intervention in private life. In fact, the insertion of this phrase in the Digest does not seem very clear, although it is referred to by Antonii Fabri in 1605, when analyzing the jurisprudence of the Court of Savoy in comparison with the Justinian Code, but as a restriction of the right of action and not as a limitation of the punitive power" (Tavares 2018, 229). However, there is no doubt that 'in criminal terms, the principle of insignificance is treated, pioneeringly, by Roxin, Krümpelmann and Dreher, who, within their respective conceptions, mainly Roxin, when proposing, as early as 1964, a conciliation between criminal law and criminal policy through an interpretation of the criminalizing norm in function

There is no specific provision in the Brazilian Penal Code for the application of the principle of insignificance; therefore, it is a supralegal cause for exclusion of typicity[34]. whose development and application have been left to legal doctrine and jurisprudence [35].

In criminal matters, the 3rd Section of the Superior Court of Justice (STJ), comprising the 5th and 6th Panels, serves as the final interpreter of criminal law in concrete cases. Consequently, it plays a fundamental role in the topical-hermeneutic method, as the Justices,

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of the injury to legal good (TAVARES 2018, 230). In the same sense: BITENCOURT 2018, 62; MARTINELLI, BEM 2021, 319.

[34] According to Juarez Tavares, 'In the absence of a positive norm that regulates the matter, the Brazilian Federal Supreme Court imposes, in order to characterize an insignificant fact, the following assumptions: 'the minimum offensiveness of the conduct, the absence of social dangerousness of the action, the reduced degree of reprehensibility of the behavior and the inexpressiveness of the legal injury caused' (TAVARES 2018, 229-230).

[35] In turn, in the Military Penal Code (CPM), Decree-Law No. 1,001, of 21 October 1969, there is an express regulation of the principle of insignificance, for example, in article 209, § 6, when it provides for bodily injury: 'in the case of very minor injuries, the judge may consider the infraction as disciplinary'. The same was provided by the legislator when dealing with the crime of theft, in article 240, § 1, of the CPM: 'If the agent is a primary offender and the stolen thing is of small value, the judge may replace the penalty of imprisonment with detention, reduce it from one to two thirds, or consider the infraction as disciplinary. The amount that does not exceed one tenth of the monthly amount of the highest minimum wage in the country is understood to be small'. For Eduardo Luiz Santos Cabette, 'it is visible that in these two cases the legislator considered the insignificance to remove the case from Criminal Law and refer it to Disciplinary Administrative Law'. (CABETTE 2013, 17).

in addition to interpreting the criminal laws and criminal procedure of the country, are responsible for uniformizing jurisprudence.

Based on the jurisprudence established by the Supreme Federal Court (STF), the Superior Court of Justice (STJ) began to apply the principle of insignificance when the following requirements are met concurrently: (i) minimal offensiveness of the agent's conduct; (ii) absence of social danger in the action; (iii) extremely reduced degree of reprehensibility of the behavior; and (iv) inexpressiveness of the legal injury caused[36].

Although the STJ does not generally apply the principle of insignificance to cases of aggravated theft involving recidivism (given the recognized higher degree of reprehensibility), some rulings have relaxed this interpretation based on the particularities of the case[37]. Even in cases involving recidivists, both the 5th[38] and 6th[39] Panels of the STJ have recognized the principle of insignificance in situations of repetition of the conduct typified under Article 155 of the Brazilian Penal Code (CPB), in its simple modality, when they find (i) the reduced value of the stolen goods; and (ii) the return of the items to the victim.

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[36] BRAZIL. STJ, EREsp n. 1.609.444/SP, Third Section, Rapporteur Minister Reynaldo Soares da Fonseca, DJe 9/11/2016.

[37] STJ, HC n. 753156/RJ, 6th Panel, Rapporteur Minister Olindo Menezes, DJe 16/09/2022.

[38] STJ, AgRg no HC n. 752.239/SC, 5th Panel, Rapporteur Minister Reynaldo Soares da Fonseca, DJe 8/8/2022.

[39] STJ, AgRg no HC n. 717.933/DF, 6th Panel, Rapporteur Minister Sebastião Reis Júnior, DJe 21/3/2022.

The principle of insignificance is also applied when the crime of embezzlement[40], under article 334 of the CPB;[41] and federal tax crimes, under Law No. 8,137/1990, provided that the following STJ requirements are met: (i) minimal offensiveness of the agent's conduct; (ii) absence of social danger in the action; (iii) reduced degree of reprehensibility of the behavior; (iv) inexpressiveness of the injury caused, which in the case of the crime of embezzlement is established by the amount of the federal tax that should be collected from the public coffers, currently in the amount of up to R$ 20,000.00 (twenty thousand reais), according to Ordinances No. 75/2012 and No. 130/2012, both from the Ministry of Finance, which provide for the unenforceability of tax enforcement for debts up to this amount. If, in turn, the tax is state, it is necessary to verify whether the state has a statutory provision similar to federal legislation[42].

Thus, what can be seen from the rulings rendered by the Superior Courts is that the principle of insignificance has been consolidated in Brazil as a supralegal ground for excluding typicity, ensuring greater individual liberty and avoiding disproportionate punishment in accordance with the topical-hermeneutic or topical-systematic method.

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[40] STJ, AgRg in REsp No. 1.819.317/PR, Fifth Panel, Rapporteur Minister Reynaldo Soares da Fonseca, DJe of 3/12/2019.

[41] BRAZIL. Penal Code (1940). 'Article 334. Evade, in whole or in part, the payment of duty or tax due for the entry, exit or consumption of goods. Penalty – imprisonment, from 1 (one) to 4 (four) years.'

[42] STJ, HC n. 535.063/SP, Third Section, Rapporteur Minister Sebastião Reis Júnior, DJe of 25/8/2020.

5. VICTIM CONSENT AS A SUPRALEGAL CAUSE FOR EXCLUDING ANTI-JURIDICITY

In the context of anti-juridicity, it is also admissible to recognize grounds for justification not exhaustively provided for by law, provided that they are based on widely accepted constitutional and social values. The Brazilian Penal Code makes no reference to supralegal causes of justification. However, the dynamic nature of social reality allows the incorporation of issues that become part of the daily lives of individuals, transforming themselves into widely accepted cultural norms. Therefore, behaviors that were once prohibited acquire acceptance in society, legitimizing themselves culturally. Since the legislator cannot foresee all the possible transformations in a people's ethico-social evolution, which may authorize or allow the performance of certain conducts initially prohibited, one must consequently admit the existence of supralegal causes for excluding the elements of crime, despite some resistance from certain sectors of doctrine and jurisprudence.

According to João Paulo Martinelli and Leonardo Schmitt de Bem, 'consent is a free agreement, a concurrence, a free acceptance. The victim's consent, therefore, is the acceptance that one's own legal interest is injured.'[43]

There is no unanimous position in doctrine regarding the placement of victim consent within the theory of crime. For example, while Francisco de Assis Toledo views the consent of the offended party as

[43] MARTINELLI, BEM 2021, 760-761.

an excluding cause of supra-legal anti-juridicity,[44] for João Paulo Martinelli and Leonardo Schmitt de Bem, the consent of the offended party is an excluding cause of criminal typicity. [45]

We defend that in some crimes the victim's dissent is an essential element of the criminal type, without which the conduct is considered socially acceptable.46 On this subject, Aníbal Bruno states that:

> (...) We have cases in which one of the elements of the type is the non-consent of the holder of the legal interest. If they consent, the type is not configured and there is no crime, not because of the absence of the unjust, but because of the absence of typicity. This is what

[44] '(...) the express consent of the offended party can and should be considered, among us, a supra-legal cause of justification, when it is imposed from outside the type for the exclusion of the illegality (the *Einwillingung* of German law) of facts harmful to fully available assets by their respective holders' (TOLEDO 1994, 214).

[45] 'This is a controversial issue in the national doctrine. We believe that consent is a cause for exclusion of criminal typicality because it excludes objective imputation. The acceptance of the holder of the legal asset to an injury, giving up the protection of the State, will always exclude typicality. When the owner of the asset consents to the injury, the risk created is outside the scope of protection of the criminal type, and, therefore, there is no imputation between the result and the agent's conduct. However, as in its origin, the majority of the doctrine understands consent to be a *supra-legal cause of justification*, that is, an exclusion of anti-juridicity not provided for by law. In this case, the holder of the legal asset gives up the protection that the State confers on him through criminal law in a true regular exercise of right. We go against the grain.' (MARTINELLI, BEM 2021, 761).

[46] BRANDÃO 2008, 198.

> happens in theft, for example. Subtracting an object implies action contrary to the owner's will. If they provide consent, there is no subtraction, but consented removal of the object.[47]

However, when the victim's consent is an integral element of the criminal type, and the legally protected good is available, consent may be a supralegal cause for exclusion of anti-juridicity. In this sense, Cezar Roberto Bitencourt states:

> But justifying consent may exist when it arises from the legally valid will of the holder of an available legal good. The consent of the holder of an available legal asset removes the contravention of the legal norm, even if eventually the consented conduct comes to conform to an abstract model of prohibition. In this case, consent operates as a supra-legal justifying cause, ruling out the prohibition of conduct, that is, anti-legality, as, for example, in the crimes of bodily injury (art. 129), false imprisonment (art. 148), theft (art. 155), damage (art. 163), etc.[48]

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[47] BRUNO 1967, 19.
[48] BITENCOURT 2018, 417.

Francisco de Assis Toledo outlines the requirements for consent to be accepted as a supralegal justification:

a) The victim must have manifested acquiescence freely, without coercion, fraud, or other defects of will;
b) The victim, at the time of acquiescence, must be in a condition to understand the meaning and consequences of their decision, thus having the capacity to do so;
c) The legal interest injured or endangered must be located within the sphere of availability of the acquiescent;
d) The specific act performed must be identical to what was foreseen and consented to by the victim.[49]

6. NON-EXIGIBILITY OF ALTERNATIVE CONDUCT AS A SUPRALEGAL CAUSE FOR EXCLUDING CULPABILITY

In order for an individual to be held criminally liable, it is not enough that they are imputable, (possessing capacity for culpability), or in other words susceptible to being the object of personal imputation, and to have awareness of the anti-juridicity of their act. It is also necessary that the individual had the power to act otherwise.

[49] TOLEDO 1994, 215.

In Brazil, the Penal Code provides for the non-exigibility of alternative conduct in article 22, covering 'irresistible moral coercion' and 'hierarchical obedience'. However, Brazilian jurisprudence has expanded this discussion to include situations that do not have an express statutory provision, configuring the supralegal exclusion of culpability.

According to Robles Planas, an issue that has been controversial for decades is the existence of a supralegal cause of exculpation of non-exigibility, since its admission would cause insecurity.[50] According to Claus ROXIN,

> The existence of a general supralegal cause of non-exigibility, as developed by Freudenthal shortly after the First World War, was already largely rejected during the Weimar era, following an initial period of widespread recognition (discussed in greater detail in §19, marginal note 11). After some hesitation, it was also dismissed by the Reichsgericht (RGSt 66, 397), at least regarding intentional crimes of commission, which are the only ones to be examined here. In the period following the Second World War, Eb. Schmidt was the first to advocate for the view that the problem of non-exigibility 'should... be awakened once

[50] ROBLES PLANAS 2011, 119.

> again from its 'Sleeping Beauty' slumber.' However, subsequent attempts to derive a general supralegal excuse of non-exigibility from the Basic Law (Grundgesetz) have generally been met with rejection.[51]

For Roxin, it is inadmissible for a judge to rule out the application of a penalty based on an empty formula such as non-exigibility. In this sense, the author rejects the possibility of applying non-exigibility through supra-legal formulas.[52]

The indeterminacy of the content of exigibility of alternative conduct remains dependent on the concrete case and even the culture of the society analyzing the fact. According to Bernardo Feijoo Sánchez, 'If it is important that the definition of a case as causality, misfortune is a social definition that depends on each type of society.'[53]

There is certainly no consensus in foreign doctrine regarding the application of non-exigibility of alternative conduct without express provision. For Flat Robles,

> A segment of current German legal scholarship denies, as a matter of principle, the existence of any such ground operating with exculpatory effects beyond the provisions of § 35 of the

[51] ROXIN 1997, 959-960.
[52] ROXIN 1997, 961.
[53] FEIJOO SÁNCHEZ 2009, 243.

StGB (or Articles 20(5) or 20(6) of the Spanish Penal Code). In this sense, it is argued that in cases of non-exigibility, the agent's capacity to conduct themselves in accordance with the law is not entirely excluded; rather, the legal order waives punishment because it considers the blameworthiness (*reproche*) insufficient to justify the penalty. Therefore, we are faced with an evaluative decision of the legislator that cannot be overridden. This holds particular significance in systems that regulate the conditions for exculpation, such as the German Penal Code, where § 35 StGB specifies that exculpation can only occur when the danger being reacted to threatens the life, limb, or liberty of the agent themselves or a close relative. By not recognizing the general and supralegal nature of non-exigibility, actions taken to protect other legal interests, or even the same interests of an unrelated person, would fall outside the scope of any possible exculpation. Conversely, another segment of scholarship admits the existence of various supralegal instances of non-exigibility. Thus, it is acknowledged that the doctrine of non-exigibility can have general effects on certain criminal offenses in the Special Part when

> faced with dangers other than those expressly provided for in § 35 StGB.[54]

However, we believe the framework provided by the topical-hermeneutic method solves the application of non-exigibility as a supralegal cause, as the circumstances of the concrete case may justify the removal of criminal reproach.

Brazilian jurisprudence recognizes the application of the non-exigibility of diverse conduct as a cause of supralegal exculpation, when the imputing crime is the one described in articles 168-A, of the Brazilian Penal Code; or 2nd, item II, of Law 8.137/90.[55]

Roberto Veloso offers some objective criteria for the judge to recognize the non-exigibility of different conduct in crimes against the tax order in the specific case: (i) a conflict situation exists only when the company's financial health is proved to be so precarious as to be in a state of bankruptcy or pre-bankruptcy; (ii) the choice made was effectively in the sense of preserving the company and not for the luxury or wealth of the partners; (iii) the scarcity of resources was

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[54] ROBLES PLANAS 2011, 119-120.

[55] Trf4, Appeal No. 5002242-43.2016.4.04.7207, 7th Panel, Rel. Des. Rony Ferreira, J. 20.02.18; Trf1, Ap 0018648-26.2011.4.01.3800, 3rd T., Des. Rel. Mário César Ribeiro, Dje 07.11.2017; Trf2, Ap 0809172-80.2008.4.02.5101, 1st Specialized T., Des. Rel. Antonio Ivan Athiê, Dje 19.07.2018; Trf3, Ap 0002246-30.2013.4.03.6131, 5th T., Des. Rel. André Nekatschalow, Dje 03.09.2018; Trf4, Ap 5003196-94.2013.4.04.7110, 7th T., Des. Rel. Salise Monteiro Sanchotene, Dje 17.07.2018; And Trf5, Ap 0013111-45.2016.4.05.8300, 4th T., Des. Rel. Leonardo Augusto Nunes Coutinho (Summoned), Dje 04.10.2018.

motivated by the general economic situation or factors beyond the partners' responsibility, rather than mismanagement[56].

7. CONCLUSION

Brazilian laws make no reference to supra-legal causes of exclusion of typicality, anti-legality or culpability. The construction of the topical-hermeneutic method, however, offers to the judge a constitutionally adequate way to recognize, in the concrete case, circumstances that authorize the removal of criminal liability, even if such hypotheses are not expressly provided for by law. Such understanding is anchored in the premise that Criminal Law, especially in a Democratic State of Law, cannot be interpreted in a purely legalistic and abstract manner. Instead, it must be guided by a practical rationality aimed achieving material justice and promoting human dignity.

Contemporary criminal dogmatics — particularly that which is aligned with constitutional principles — recognizes the existence and validity of the so-called supralegal grounds for excluding typicity, illegality and culpability, which are affirmed through a systematic, evaluative, and principle-based interpretation of the legal system.

In the field of typicity, for instance, the jurisprudential construction of the principle of insignificance stands out. Although not expressly provided for in the Brazilian Penal Code, it excludes material typicity for conduct that, while formally typical, does not represent a relevant injury to the protected legal interest. This is a supra-legal cause for excluding typicity that clearly illustrates the possibility for a judge,

[56] VELOSO 2011, 245.

through consistent legal argumentation sensitive to the specificities of the case, to set aside the criminal rule in favor of a fairer and more proportional solution.

Victim consent may exclude the typicity of the conduct when it is an intrinsic requirement of the criminal type, or, in some cases, exclude the illegality of the conduct when it is external to the type. For consent to function as a justification, the following requirements must be present: (i) the victim, at the time of agreement, must be in a condition to understand the meaning and consequences of their decision, thus possessing capacity (imputability); (ii) the legal interest injured or endangered must fall within the sphere of the acquirer's disposability; (iii) the victim must have manifested their acquiescence without coercion, fraud, or any other defect of will; (iv) the typical fact must remain within the scope of what was previously accepted by the victim.

The consent of the offended party may exclude the typicity of the conduct, when an intrinsic requirement of the criminal type, or, in some cases, exclude the illegality of the conduct, when external to the type. For consent to be justifying, the following requirements must be present: (i) the offended party, at the time of agreement, is in a position to understand the meaning and consequences of his decision, thus possessing capacity (imputability); (ii) the legal interest injured or exposed to danger is located in the sphere of availability of the acquiescent; (iii) the offended party has expressed his or her agreement, without coercion, fraud or other defect of will; (iv) the typical fact is within what was previously accepted by the victim.

Regarding culpability, the non-exigibility of alternative conduct as a cause for supralegal excuse is accepted in cases of social security

contribution evasion (article 168-A of the Penal Code). The jurisprudence of the Federal Regional Courts has repeatedly excluded the criminal liability of taxpayers who, facing grave financial difficulties, failed to remit the values withheld from their employees to the social security system in order to maintain jobs and ensure the payment of suppliers.

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